

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
BRIAN S. MILLER, JUDGE

DIVISION II

CA06-1097

May 2, 2007

RICK POWELL AND FRED NUTT  
APPELLANTS

v.

AN APPEAL FROM FAULKNER COUNTY  
CIRCUIT COURT  
[NO. CV05-901]

TAB TOWNSELL, MAYOR, CITY OF  
CONWAY

APPELLEE

HONORABLE DAVID REYNOLDS,  
CIRCUIT JUDGE

REVERSED AND REMANDED

Two Conway firefighters sued the city, claiming that the promotional exam they took was changed at the last minute to an unexpected format. The firefighters asked for a declaration that the test was administered contrary to the city's exam announcement and for an order directing that a test be given in accordance with the announcement. On the city's motion, the court dismissed the firefighters' complaint for failure to exhaust administrative remedies, and they now appeal. We reverse and remand for further factual development of the issues in dispute.

The Conway Fire Department issued a Notice of Promotional Examination stating that an upcoming test for the rank of lieutenant would consist of a written exam and a "scenario test" or practical exam. Appellants sat for the test on April 12, 2005, and, according to them, the scenario test was replaced by a 25-question quiz on the fire department's standard operating procedures. Appellants later executed unsworn written statements in which they

asserted that, after taking the test, they 1) heard of other men “being promoted off the test”; 2) wrote to Fire Chief Castleberry on May 1, 2005, seeking a meeting to discuss the testing procedure; 3) held a meeting with the chief on May 9, 2005, where he told them that there was nothing he could do about the situation; and 4) held a meeting with Mayor Tab Townsell on May 11, 2005. On October 19, 2005, Mayor Townsell wrote appellants a “courtesy” letter explaining that he saw no need to change the test results.

After receiving the mayor’s letter, appellants filed this lawsuit in circuit court. In their complaint, they alleged that there were no administrative procedures available for challenging the test but that they nevertheless attempted to resolve the situation with the fire chief and the mayor prior to filing suit. The city responded that appellants had not exhausted their administrative remedies and moved to dismiss. Attached to the city’s motion was a page from its employee handbook titled “Grievance Procedure.” This procedure, the city argued, set out the administrative remedies that appellants were required to exhaust before going to court. The procedure essentially provided that an employee should present his complaint in writing to a supervisor “within 10 calendar days of the incident” and, if not resolved, present the complaint in writing to his department head and, if still not resolved, present the complaint in writing to the mayor, whose decision would be final.

In response to the motion to dismiss, appellants argued that they had exhausted their administrative remedies by filing a written complaint with the fire chief, asking the mayor to review the testing procedure, and receiving a “letter ruling” from the mayor. They also argued that the fire chief told them that “the promotion test did not fall under the city’s

grievance procedures” and that the city waived compliance with the grievance procedure by not objecting to the timeliness or form of their complaints.

Following a hearing, the trial judge ruled that appellants did not comply with the grievance procedure and therefore did not exhaust their administrative remedies. The judge dismissed appellants’ complaint, and they now bring this appeal.

It is apparent that the trial judge, in granting the city’s motion to dismiss, relied on a matter outside the complaint—the page from the city’s handbook containing the grievance procedure. We will therefore treat the motion to dismiss as a motion for summary judgment. *See generally Ganey v. Kawasaki Motors Corp.*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (May 4, 2006); *Ford v. Ark. Game & Fish Comm’n*, 335 Ark. 245, 979 S.W.2d 897 (1998). Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Ganey, supra*. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.*

Summary judgment may be premature where further development of crucial matters is required. *See, e.g., Spears v. City of Fordyce*, 351 Ark. 305, 92 S.W.3d 38 (2002); *Waire v. Joseph*, 308 Ark. 528, 825 S.W.2d 594 (1992). That is the situation here. While the city provided the trial court with the grievance-procedure page from its handbook, no affidavit or ordinance was presented to show that the city had adopted the handbook, nor was it shown that the handbook provisions constituted a contract between the city and these firefighters. *See Crain Indus., Inc. v. Cass*, 305 Ark. 566, 810 S.W.2d 910 (1991); *Cisco v. King*, 90 Ark. App. 307, 205 S.W.3d 808 (2005) (holding that, to constitute a contract, language

in a handbook must be definite enough to constitute an offer; the handbook must be disseminated to the employees; the employees must stay on the job after receiving the handbook, which constitutes their acceptance; and consideration must be furnished for its enforceability). Other matters in need of further development include whether the grievance procedure applies to appellants' particular complaint regarding testing; whether the city led appellants to believe that the grievance procedure was inapplicable, *see, e.g., Cisco, supra*; and whether the city waived compliance with the formalities of the grievance procedure. These latter two issues in particular cannot be satisfactorily considered until further facts are established by affidavits, depositions, or other discovery devices concerning the manner in which the firefighters presented their complaint and the manner in which the city responded.

Based on the foregoing, we believe that too many matters remain unresolved to warrant the entry of summary judgment at this juncture. We therefore reverse and remand for further development of the record.

PITTMAN, C.J., and MARSHALL, J., agree.